

2002

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Recommended Citation

Jonathan Choa, *Civilians, Service-Members, and the Death Penalty: The Failure of Article 25A to Require Twelve-Member Panels in Capital Trials for Non-Military Crimes*, 70 Fordham L. Rev. 2065 (2002).

Available at: <https://ir.lawnet.fordham.edu/flr/vol70/iss5/34>

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Civilians, Service-Members, and the Death Penalty: The Failure of Article 25A to Require Twelve-Member Panels in Capital Trials for Non-Military Crimes

Cover Page Footnote

J.D. Candidate, 2003, Fordham University School of Law. I would like to thank Christine for her endless support in this project.

CIVILIANS, SERVICE-MEMBERS, AND THE DEATH PENALTY: THE FAILURE OF ARTICLE 25A TO REQUIRE TWELVE-MEMBER PANELS IN CAPITAL TRIALS FOR NON-MILITARY CRIMES

*Jonathan Choa**

If the twelve Apostles on their twelve Thrones, must try us in our eternal State, good Reason hath the Law to appoint the Number of Twelve to try our Temporal.¹

INTRODUCTION

On December 28, 2001, President Bush signed the National Defense Authorization Act for Fiscal Year 2002 (“NDAA”). Section 582 added Article 25a to the Uniform Code of Military Justice (“UCMJ”). It states:

In a case in which the accused may be sentenced to a penalty of death, the number of members shall be not less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.²

Before the amendment, only five members were necessary.³ Now, at least twelve are required except where physical conditions or military exigencies make convening twelve members unreasonable. In 2002, it is possible that President Bush will have to decide to approve the death warrants of two soldiers, Dwight Loving and Ronald Gray,

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1. Giles Duncombe, *Trials per Pais* 79 (6th ed. 1725).

2. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012, 1124 (2001).

3. Uniform Code of Military Justice art. 16, 10 U.S.C. § 816 (2000).

or grant them clemency.⁴ Panels of fewer than twelve convicted them both, but their respective convictions and sentences have been upheld throughout a lengthy appeals process.⁵ They could become the first people executed by the military since 1961 when Private John Arthur Bennett was hanged outside of Fort Leavenworth for raping and attempting to murder an eleven-year old Australian girl.⁶ Since then only one other soldier has been close to execution, but President Kennedy commuted his death sentence to life.⁷

The legislative change in panel size and the possibility of military executions combine to focus a bright light on the military justice system. The current war on terrorism and the possibility of military tribunals have also increased the attention given to military justice.⁸ The time has come to reevaluate the way soldiers are tried in capital cases in the military before the first soldiers in forty years are executed. Six soldiers currently sit on death row. Loving and Gray have seemingly exhausted their appeals. The other four, Wade Walker, Kenneth Parker, William Kreutzer, and Jessie Quintanilla,⁹ have yet to have their first appeals heard. All have been accused of murder, not uniquely military crimes such as spying or aiding the enemy.

Unlike soldiers, civilians charged with capital offenses are guaranteed twelve jurors in all jurisdictions that have the death penalty, including the federal jurisdiction.¹⁰ Article 25a was meant to remedy this problem. This Note examines that dichotomy and the new legislation designed to eliminate it. This Note argues that Article 25a, the weight of two hundred years of tradition to the contrary, was correct in requiring at least twelve members on a panel in military capital trials. However, Article 25a does not effectively create a twelve-member requirement. This Note offers an amendment that would plug Article 25a's loophole and require twelve-member panels in *all* capital, military trials for civilian crimes.

4. See *infra* notes 89-93 and accompanying text. This process could be lengthy and may not occur for some time.

5. See *Loving v. United States*, 122 S. Ct. 342 (2001) (denying certiorari); *Gray v. United States*, 532 U.S. 919 (2001) (denying certiorari).

6. Cody M. Weston, Note, *United States v. Loving: The Resurrection of Military Capital Punishment*, 77 Or. L. Rev. 365, 365 (1998).

7. Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 Mil. L. Rev. 1, 4 n.10 (1994).

8. It should be noted that the military tribunals proposed by President Bush would operate independently of the rules and standards of military justice. See Neil A. Lewis, *Rules on Tribunal Require Unanimity on Death Penalty*, N.Y. Times, Dec. 28, 2001, at A1.

9. These cases are not discussed in depth because their first appeals have not yet been filed with their respective Courts of Criminal Appeals.

10. See Raymond Bonner, *Push Is On for Larger Jury In Military Capital Cases*, N.Y. Times, Sept. 4, 2001, at A12 (reporting that every state that has the death penalty and the federal government require twelve jurors).

This Note in general, and Part II specifically, focus on the civilian, federal system. The federal system presents the best comparison because Congress makes the rules for federal courts¹¹ and the military.¹² In the limited scope of this Note, it would not be fully possible to analyze the way the death penalty is administered in all thirty-eight states that have capital punishment.¹³ The disadvantage of this limited focus is that most capital cases occur in state courts. Also, rights guaranteed to a defendant facing the death penalty in a federal trial are not necessarily guaranteed to a defendant in a state court.

Part I describes the major historical developments in panel size, capital punishment, incorporation of civilian protections in military proceedings, and procedures for charging and prosecuting the accused. This part begins by outlining the history and development of the panel's size and the death penalty from the Founding through the inception of the UCMJ.¹⁴ This part will illustrate that the original rationale for requiring only five panel members is no longer applicable. It then examines prior incorporation of civilian protections into military law to show that previous incorporations of civilian protections have not hindered the military from enforcing good order and discipline¹⁵—the standard that all provisions of the UCMJ must meet.¹⁶ To provide readers with a helpful background of military justice, this part concludes with a description of how defendants are charged and prosecuted in the military.¹⁷

Part II is an analysis of the federal and military systems, focusing on three key aspects of capital defense. To give this analysis a practical context, this part begins by detailing the facts of three recent military capital cases, with an emphasis on the crimes' "civilian" nature. This part, in addition to illustrating the problems with the military panel,¹⁸ also examines the quality of defense,¹⁹ and the appellate procedure²⁰ in the military and federal systems. These last two sections are designed to assess any argument that the military can use less than twelve-member panels because it adequately protects the defendant with other safeguards. This part focuses on the federal system, but this narrow focus does not diminish the comparison. The relevant state cases on jury composition are largely controlled by Supreme Court decisions since the right to a jury trial is secured by the

11. U.S. Const. art. III, § 1.

12. *Id.* art. I, § 8, cl. 14.

13. See Bonner, *supra* note 10, at A12.

14. See *infra* Part I.A.

15. See *infra* Part I.B.

16. Manual for Courts-Martial, United States, pmbl. (2000) [hereinafter MCM].

17. See *infra* Part I.C.

18. See *infra* Part II.B.

19. See *infra* Part II.C.

20. See *infra* Part II.D.

Constitution.²¹ Likewise, because of the constitutional right to counsel,²² the minimum standards for effective counsel decided by the Supreme Court are also binding upon the state courts. The federal appellate procedure is also relevant to all state death penalty cases, because habeas corpus proceedings can be heard in federal courts.²³

Part III argues that twelve-member panels are necessary in military capital trials for civilian crimes but not adequately provided for in the new legislation. This part begins by arguing the context for adopting the five-member panels in 1786 has never been properly reevaluated and is no longer applicable.²⁴ This part then refutes the argument that introducing civilian protections into the military setting is detrimental by discussing previous incorporations of civilian rights that have not harmed the military.²⁵ It then argues guaranteed twelve-member panels are necessary because of the inability of the military justice system to protect defendants' rights as effectively as the federal system.²⁶ Twelve-member panels can better protect a defendant because the vote to convict and sentence to death must be unanimous in the military.²⁷ The more panel members, the more likely the defense is to get a dissenting vote.²⁸ The reason why military justice must meet a higher standard in capital cases is because death is different than other non-capital punishments.²⁹ The Note concludes that the new legislation does not effectively institute a twelve-member panel requirement³⁰ and offers a solution to ensure the protection of soldiers' rights while maintaining the integrity of the military justice system.³¹

21. U.S. Const. art. III, § 2, cl. 3; *id.* amend. VI.

22. *Id.* amend. VI.

23. *See id.* art. I, § 9, cl. 2; Michael E. Tigar, *Federal Appeals: Jurisdiction and Practice* § 3.14 (2d ed. 1993); *see also* Edward P. Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* 93-94, 493-95 (1998) (discussing the development of habeas corpus and the death penalty).

24. *See infra* Part III.A.1.

25. *See infra* Part III.A.2.

26. *See infra* Part III.A.3. The same argument could be extended to twelve jurors in all courts-martial where the accused could face a substantial amount of jail time; however, this Note specifically address Article 25a. Non-capital cases are beyond the scope of this Note. *See infra* text accompanying notes 305-07.

27. Uniform Code of Military Justice art. 52, 10 U.S.C. § 852 (2000).

28. *See infra* text accompanying note 356.

29. This might lead to the conclusion that all military capital trials should have twelve-member panels, but that is not the contention of this Note. It focuses only on soldiers accused of violating Article 188 (murder) and, to a lesser extent, Article 120(a) (rape). In strictly military crimes like spying or aiding the enemy, the interests of good order and discipline may supersede the need to protect defendants' rights. This is justified because non-military murder affects a few people, while spying or aiding the enemy could endanger a whole platoon, corps, or even the country.

30. *See infra* Part III.B.

31. *See infra* Part III.C.

I. THE DEVELOPMENT AND WORKINGS OF MILITARY JUSTICE

The first section of this part describes the development of the panel size in military capital cases.³² It is important to scrutinize the context in which five-member panels were adopted in 1786 in order to determine if the relevance of this historical rationale is still relevant or should be reevaluated. This part's subsequent examination of the military's prior incorporation of civilian protections is important to illustrate that incorporation can be done without hurting good order and discipline.³³ If other protections, like *Miranda* warnings and aggravating factors used to determine the death penalty, have been successfully incorporated, then there is good reason to believe that twelve-member panels can be incorporated as well. The final section describes how a service member is charged and prosecuted in order to better understand some of the problems in the system.³⁴

A. History of Military Justice

This section examines the development of the panel size and death penalty solely in the Army. The Navy did not receive its own written rules of governance until after five-member panels were created in the Army.³⁵ The Marine Corps did not have its own rules; it was governed by the rules of the Navy when at sea and by the rules of the Army when ashore.³⁶ The Air Force did not exist in 1786. The purpose of this section is to set the foundation for examining whether the rationale for adopting five-member panels in 1786 is still valid today. The history will show that thirteen-member panels were required before the change in 1786, and that the rationale for the change is no longer relevant.

1. Number of Panel Members

Unlike federal and state statutes for capital trials,³⁷ the military has required only a minimum of five members in its trial equivalent, the general court-martial, even for capital trials.³⁸ This was not always the case. The first national Articles of War to govern the Army were enacted on June 30, 1775 and amended on November 7, 1775.³⁹

32. See *infra* Part I.A.

33. See *infra* Part I.B.

34. See *infra* Part I.C.

35. John F. O'Connor, *Don't Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. Miami L. Rev. 177, 193 (1997).

36. See Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 Mil. L. Rev. 1, 12 n.43 (1998).

37. See Bonner, *supra* note 10 (writing that every state that has the death penalty and federal death penalty legislation require twelve jurors).

38. Uniform Code of Military Justice art. 16, 10 U.S.C. § 816 (2000).

39. William B. Aycock & Seymour W. Wurfel, *Military Law Under the Uniform*

Article XXXIII of the Articles of War of 1775 required that no general court-martial “shall consist of a less number than thirteen, none of which shall be under the degree of a commissioned officer.”⁴⁰ The number of panel members was based on British practice.⁴¹

After the Revolutionary War, Secretary of War Henry Knox presented a proposal to amend the Articles of War to require only five officers in a general courts-martial.⁴² Knox was concerned that the downsizing of an army, coupled with its sprawl over distant garrisons, would make it impossible to impanel thirteen commissioned officers.⁴³ He suggested “that five should be sufficient, in cases where a greater number cannot be obtained.”⁴⁴ Knox also argued that discipline would suffer if offenders could not be given a speedy trial. He cited the opinion of “many judicious officers . . . that the discipline of the army would have been bettered . . . had the courts martial been composed of a less number of members. The sickness or absence of members frequently protracted the trial to the most inordinate lengths, by which the service was extremely injured.”⁴⁵ Knox thought a written record of the evidence and proceedings, as well as an independent review, protected against “unfair practices.”⁴⁶

Congressmen Arthur St. Clair, Henry Lee, and John Lawrance took up Knox’s proposal on March 9, 1786.⁴⁷ Congress adopted their report on March 30, 1786, without any recorded debate, and repealed section 14 of the Articles of War of 1776.⁴⁸ The amended Articles of War established, “[g]eneral courts-martial may consist of any number of commissioned officers from 5 to 13 inclusively; but they shall not consist of less than 13, where that number can be convened without manifest injury to the service.”⁴⁹

Code of Military Justice 9-10 (Greenwood Press 1972) (1955).

40. American Articles of War of 1775, art. XXXIII, *reprinted in* William Winthrop, *Military Law and Precedents* app. at 956 (Gov’t Printing Office 1920) (1886).

41. Articles I and II of Section XV of the British Articles of War of 1765 stated, “[a] General Court-martial in Our Kingdoms of *Great Britain* or *Ireland*, shall not consist of less than Thirteen Commissioned Officers.” British Articles of War of 1765, *reprinted in* Winthrop, *supra* note 40, app. at 942. Thirteen-member panels were also adopted by Massachusetts to govern its militia. Article 32 of the Massachusetts Articles of War stated, “[n]o General Court Martial shall consist of a less number than thirteen [including the president], none of which shall be under the degree of a Field Officer.” Massachusetts Articles of War (1775), *reprinted in* Winthrop, *supra* note 40, app. at 950.

42. 29 *Journals of the Continental Congress: 1774-1789*, at 851 (John C. Fitzpatrick ed., Gov’t Printing Office 1933) (1785).

43. *Id.*

44. *Id.*

45. *Id.* at 851-52.

46. *Id.* at 852.

47. *Id.* at 854 n.1.

48. 30 *Journals of the Continental Congress*, *supra* note 42, at 145.

49. American Articles of War of 1786, art. 1, *reprinted in* Winthrop, *supra* note 40, app. at 972. There must have been some debate on this amendment because the final

2. History of the Death Penalty

Understanding the actual crimes requiring administration of the death penalty is important to understand the 1786 amendment. At first, the American Articles of War of 1775 authorized the death penalty for only three offenses: shamefully abandoning one's post, disclosing or giving a false watchword, and compelling a senior officer to surrender his command to the enemy.⁵⁰ The revision of these Articles of War several months later added two more capital offenses, "striking or offering violence against a superior officer in the execution of his office,"⁵¹ and "committing violence to any person bringing provisions or other necessaries into camp."⁵² The amended articles of 1776 authorized death for sixteen different offenses, all military in nature.⁵³ In 1863, when courts-martial were given jurisdiction in time of war or rebellion over a host of crimes now considered felonies, such as murder, robbery, arson, and manslaughter, the number of offenses subject to capital punishment expanded.⁵⁴ The punishment was to be at minimum the equivalent punishment of the jurisdiction where the crime occurred.⁵⁵ If that penalty was death, then the soldier could be executed.

In 1916, the Articles of War were revised again.⁵⁶ Attacking a person bringing supplies to camp, made a capital crime in 1776,⁵⁷ was made a non-capital offense.⁵⁸ Military jurisdiction over the previously mentioned civilian crimes was extended to cover peacetime as well as war and rebellion,⁵⁹ but the penalty was no longer connected to the penalty of the jurisdiction, making these offenses non-capital.⁶⁰ Rape and murder in time of war and rebellion, or when committed outside the continental United States, were expressly made capital crimes.⁶¹

3. The Uniform Code of Military Justice

In the 1940s, reformers began to clamor for a revision of the Articles of War because of the abuses they perceived during World War II.⁶² Studies by Congress and the separate military branches

version is slightly different than the one proposed by St. Clair, Lee, and Lawrance. See 30 Journals of the Continental Congress, *supra* note 42, at 145.

50. O'Connor, *supra* note 35, at 184.

51. *Id.* at 185.

52. *Id.*

53. *Id.* at 184-85.

54. *See id.* at 189-90.

55. *Id.* at 190.

56. *Id.* at 191.

57. *Id.* at 185.

58. *Id.* at 191-92.

59. *Id.* at 192.

60. *Id.*

61. *Id.*

62. See William T. Generous, Jr., *Swords and Scales: The Development of the*

discovered severe sentences, incompetent defense counsel, unlawful command influence, and lack of qualified men to serve in courts-martial.⁶³ To solve these problems, Secretary of the Navy James Forrestal created a new committee with a mandate to design a whole new body of law.⁶⁴ It was to accomplish three main goals:

(1) integrate the systems of the three services into a Uniform Code of Military Justice; (2) make the new code a modern one, "with a view to protecting the rights of those subject to the code and increasing public confidence in military justice, without impairing the performance of military functions"; and (3) improve the arrangement and draftsmanship of the military justice statutes.⁶⁵

After some congressional revision, the UCMJ was enacted on May 5, 1950.⁶⁶ When it became effective on May 31, 1951, the Army, Navy, Marine Corps, Coast Guard, and Air Force were governed for the first time by the same articles.⁶⁷ Article 16 kept the same minimum requirement of five members for general courts-martial, but removed the requirement, in place since 1786, that thirteen officers be impaneled "where that number can be convened without manifest injury to the service."⁶⁸ The new article simply read, "general courts-martial, consisting of—a military judge and not less than five members."⁶⁹

The UCMJ removed geographical and wartime restrictions on capital crimes and gave the military jurisdiction over "all enumerated capital offenses no matter where or when the crime was committed."⁷⁰ Connected to this, the UCMJ eliminated the requirement that commanders give accused soldiers to civilian authorities for trial if requested by the victim.⁷¹ Felony murder was made a capital offense when "the underlying felony was an actual or attempted burglary, sodomy, rape, robbery, or aggravated arson."⁷² Rape was also made a capital offense no matter if it was committed during war or peacetime.⁷³ The UCMJ also made striking an officer in the execution of his duties a non-capital offense as long as it occurred in peacetime.⁷⁴

Uniform Code of Military Justice 24 (1973).

63. *Id.* at 16.

64. *Id.* at 34.

65. *Id.*

66. Aycock & Wurfel, *supra* note 39, at 15.

67. *Id.*

68. American Articles of War of 1786, art. 1, *reprinted in* Winthrop, *supra* note 40, app. at 972; Uniform Code of Military Justice art. 16, 10 U.S.C. § 816 (2000).

69. Uniform Code of Military Justice art. 16(1)(A).

70. O'Connor, *supra* note 35, at 196.

71. *Id.* at 197.

72. *Id.* at 196.

73. Uniform Code of Military Justice art. 120.

74. Uniform Code of Military Justice art. 90.

B. *Incorporation of Civilian Liberties in the Military*

After passage of the UCMJ, various civil liberties of the civilian justice system were incorporated into the military system. The civilian judges that sat on the Court of Military Appeals, the highest military appellate court, began to "import[] into the military most of the rights of criminal defendants which expanded so dramatically in the post-[World War II] period."⁷⁵ A string of cases began to expand civil liberty protections for the soldiers.⁷⁶ *United States v. Matthews*⁷⁷ and *United States v. Tempia*⁷⁸ are particularly important because of their direct incorporation of protections from the civilian system, their wide-ranging impact on how soldiers are prosecuted in the military, and their seemingly minimal impact on good order and discipline.

1. *United States v. Matthews*

In *United States v. Matthews*, the defendant, who was convicted and sentenced to death for the murder and rape of a woman in Germany, had his death sentence overturned.⁷⁹ The Court of Military Appeals ("CMA") ruled that the military death penalty as promulgated in the UCMJ was unconstitutional because it did not require the panel members to explicitly identify the aggravating factors relied upon in the imposition of the death penalty.⁸⁰ The court's decision was based upon the civilian precedent in *Furman v. Georgia*,⁸¹ where the Supreme Court held that the jury's sentencing discretion had to be controlled in regards to the death penalty.⁸² The CMA did not go so far as to hold the UCMJ unconstitutional, but it did prevent the imposition of the death penalty.⁸³ The court, however, did suggest that the President or Congress could remedy the defect by

75. James B. Jacobs, *Socio-Legal Foundations of Civil-Military Relations* 7 (1986).

76. See, e.g., *Giles v. Secretary of the Army*, 627 F.2d 554 (D.C. Cir. 1980) (striking down compulsory urine tests because they were a form of self-incrimination); *United States v. Ware*, 1 M.J. 282 (C.M.A. 1976) (limiting convening authority's power to overrule the trial judge); *United States v. Jordan*, 1 M.J. 334 (C.M.A. 1976) (holding foreign searches are not exempt from the exacting standards of search and seizure law); *United States v. Douglas*, 1 M.J. 354 (C.M.A. 1976) (holding pre-trial transcripts from the Article 32 hearing were inadmissible at trial); *United States v. Courtney*, 1 M.J. 438 (C.M.A. 1976) (striking down certain maximum sentences).

77. 16 M.J. 354 (C.M.A. 1983).

78. 37 C.M.R. 249 (C.M.A. 1967).

79. *Matthews*, 16 M.J. at 359, 382.

80. *Id.* at 354, 379, 382 (holding that in light of *Furman v. Georgia*, 408 U.S. 238 (1972), the statutory class was too broad in military capital punishment); see also John S. Cooke, *The Death Penalty in Courts-Martial: United States v. Matthews*, 31 Fed. B. News & J. 245, 246 (1984).

81. 408 U.S. 238 (1972).

82. *Matthews*, 16 M.J. at 369 (citing *Furman v. Georgia*, 408 U.S. 238 (1972)).

83. See Cooke, *supra* note 80, at 246.

enumerating aggravating factors that must be present before the accused can be sentenced to death.⁸⁴ The administration of the death penalty in the federal system required the finding of such aggravating factors.⁸⁵ President Ronald Reagan, in 1984, did just that in an Executive Order creating Rules for Court-Martial 1004.⁸⁶ This required a unanimous finding that one aggravating factor, out of a possible ten,⁸⁷ be present and that admissible aggravating circumstances outweigh any mitigating factors.⁸⁸

Dwight Loving was one of the first soldiers to be prosecuted under this new rule. He was an Army private convicted of two murders and sentenced to death.⁸⁹ Loving appealed to the Supreme Court arguing the President did not have the authority to detail the aggravating factors necessary to impose a sentence of death.⁹⁰ He claimed this was a violation of separation of powers because only Congress could formulate laws regarding the military.⁹¹ The Supreme Court first affirmed the CMA's decision in *Matthews* that *Furman* applied to the military.⁹² The Court then held in *Loving* that Congress lawfully delegated its power to the President to prescribe the aggravating factors.⁹³

2. *United States v. Tempia*

In *United States v. Tempia*, a soldier was charged and convicted of making obscene proposals to three young girls in a library bathroom.⁹⁴ The CMA threw out the conviction because it was based on a confession the defendant made without receiving an adequate warning of his right to counsel as required in the recent civilian decision *Miranda v. Arizona*.⁹⁵ The *Tempia* case is remarkable for its full incorporation of civilian protections into the military. The accused had been advised as to his right to remain silent and the purpose for which his statements could be used, but he was not told of

84. See *Matthews*, 16 M.J. at 380-81.

85. 18 U.S.C. §§ 3591, 3592 (2000).

86. See Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984).

87. There are now eleven aggravating factors. MCM, *supra* note 16, Rules for Court-Martial 1004.

88. See Exec. Order No. 12,473, 49 Fed. Reg. 17,152.

89. *Loving v. United States*, 517 U.S. 748, 751 (1996). Loving robbed two 7-Eleven stores at gunpoint, robbed and killed two cab drivers, and attempted to rob another. *Id.*

90. *Id.* at 751-52.

91. *Id.* at 754-55.

92. *Id.* at 754.

93. *Id.* at 773.

94. *United States v. Tempia*, 37 C.M.R. 249, 252 (C.M.A. 1967).

95. *Id.* at 260. According to the Court in *Miranda*, a prosecution cannot use statements resulting from custodial interrogation unless the prosecution demonstrates the use of necessary procedural safeguards. *Miranda v. Arizona*, 384 U.S. 436 (1966).

his right to consult with an attorney.⁹⁶ This was enough to vacate the conviction.⁹⁷ The prosecution argued the *Miranda* decision did not apply to the military,⁹⁸ and the defendant had been fully advised of his rights under Article 31 of the UCMJ.⁹⁹ The court rejected that argument, stating, "our duty [is] to follow the interpretation by the Supreme Court of the Constitution of the United States insofar as it is not made expressly or by necessary implication inapplicable to members of the armed forces."¹⁰⁰ *Tempia*, despite its wide impact on the system, has never been overruled for hurting good order and discipline or for any other reason.¹⁰¹ In addition, *Matthews* did not cripple the military's ability to sentence soldiers to death. The defect was fixed and Loving and several other soldiers have since been sentenced to death.¹⁰²

C. Structure of the Military Justice System

This section explains the military process for charging and prosecuting service members, which is very different from the federal model. This presentation is important because many of the problems in the military justice system stem from the intimate relationship between the accuser and the trier of fact. These problems can be better understood with background knowledge of the military process.

Under the UCMJ, infractions are first brought to the attention of the commanding officer who has authority to issue non-judicial punishment.¹⁰³ This commanding officer can refer it to the senior commanding officer, who has summary court-martial jurisdiction.¹⁰⁴ That commander can either administer non-judicial punishment or refer it to a summary, special, or general court-martial.¹⁰⁵

96. *Tempia*, 37 C.M.R. at 257.

97. *Id.* at 260.

98. *Id.* at 253.

99. *Id.* at 258. Article 31 contains the same warnings as *Miranda* about right to silence and purpose of any statements made. However, it does not mention the right to counsel. Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (2000).

100. *Tempia*, 37 C.M.R. at 260.

101. See generally *United States v. Curtis*, 52 M.J. 166 (C.A.A.F. 1999); *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *Loving v. Hart*, 47 M.J. 438 (C.A.A.F. 1998); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997).

102. A search for articles or commentaries criticizing the *Matthews* or *Tempia* decision and alleging decreased good order and discipline yielded none.

103. Charles A. Shanor & Timothy P. Terrell, *Military Law in a Nutshell* 99 (1980). Non-judicial punishment is designed to punish minor offenses without a court-martial proceeding. *Id.* at 63-68; see also Uniform Code of Military Justice art. 15.

104. See Shanor & Terrell, *supra* note 103, at 100. A summary court-martial, like non-judicial punishment, is limited in the punishment that can be administered. *Id.* at 71; see also Uniform Code of Military Justice art. 20.

105. See Shanor & Terrell, *supra* note 103, at 100. A special court-martial consists of three members and is limited in the punishments it can administer. It cannot administer capital punishment. See *id.* at 75; see also MCM, *supra* note 16, Rule for

If a case is referred to a general court-martial, the only forum where capital trials can be tried,¹⁰⁶ there must be a formal Article 32 investigation conducted by an investigating officer.¹⁰⁷ This functions essentially as a grand jury. After this procedure, the investigating officer prepares a report to the convening authority, the commander who referred the case to the general court-martial.¹⁰⁸ The convening authority then has the responsibility to appoint the court-martial members, the prosecutor, and the defense attorney.¹⁰⁹ The Judge Advocate General ("TJAG"), who is responsible for directing the members of his or her service branch's Judge Advocate General's Corps ("JAGC"),¹¹⁰ appoints the military judge of a general court-martial or designates someone to do the task.¹¹¹

The actual workings of a court-martial are nearly identical to a federal criminal trial: The Federal Rules of Evidence apply¹¹² as do the Federal Rules of Criminal Procedure, unless explicitly replaced by the UCMJ or inconsistent with military justice.¹¹³ The major difference is that a verdict requires only two-thirds of the panel members.¹¹⁴ However, in death penalty cases the verdict must be unanimous in regards to the guilt, the presence of aggravating factors, the balance between mitigating and aggravating circumstances, and the sentence of death.¹¹⁵

The appeals process begins with approval of the verdict by the convening authority. In capital cases, appeals then go to the Courts of Criminal Appeals ("CCA")¹¹⁶ and then to the United States Court of Appeals for the Armed Forces ("CAAF").¹¹⁷ The Supreme Court can review decisions from the CAAF on a writ of certiorari.¹¹⁸ The President must also approve all sentences of death.¹¹⁹ Outside of this

Court-Martial 1301.

106. Uniform Code of Military Justice art. 18.

107. *See id.* art. 32; Shanor & Terrell, *supra* note 103, at 100-01; *see also infra* Part II.C.2.

108. *See* Shanor & Terrell, *supra* note 103, at 101.

109. *Id.* at 102; *see infra* Part II.B.2.

110. 10 U.S.C. § 3037 (2000).

111. Uniform Code of Military Justice art. 26.

112. Shanor & Terrell, *supra* note 103, at 105.

113. *Id.* at 120-21.

114. Uniform Code of Military Justice art. 52.

115. *Id.*

116. Uniform Code of Military Justice art. 66. This court was formerly known as the Court of Military Review ("CMR"). National Defense Authorization Act for 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831-32 (1995). The name of the court at the time of the decision being discussed will be the name used in this Note.

117. Uniform Code of Military Justice art. 67. CAAF was formerly known as the United States Court of Military Appeals ("CMA"). National Defense Authorization Act for 1995 § 924. The name of the court at the time of the decision being discussed will be the name used in this Note.

118. Uniform Code of Military Justice art. 67a.

119. *Id.* art. 71.

appellate structure, the accused can petition TJAG in writing for a new trial within five years of approval of the sentence by the convening authority. The defendant usually needs to show newly discovered evidence or a fraud in the initial court-martial to receive a new trial.¹²⁰

Military jurisdiction to prosecute service members has developed slowly over history.¹²¹ Today, the test is whether the person was on active-duty status when the crime was committed and when he or she is being tried.¹²² It does not matter if the victim was a civilian or if the crime was committed outside of a military installation or if the soldier was off duty. The mere status of being a soldier subjects active-service members to military justice.¹²³

As shown above, courts-martial in the United States originally involved thirteen panel members. This requirement was later changed to five. At the same time, the crimes that were punishable by death were also changing. In 1950, the UCMJ was passed and the five-member panel was continued along with new jurisdiction over peacetime murder and rape. Part II will continue with a discussion of the current state of the law in military and federal systems and how they protect defendants.

II. ANALYSIS OF FEDERAL AND MILITARY JUSTICE SYSTEMS

This part examines three significant aspects of the trial process in the military and federal systems: the jury,¹²⁴ the defense,¹²⁵ and the appellate procedure.¹²⁶ These three areas comprise a large part of the trial process, and present the most material for evaluating the ability of the military justice system to protect defendants. Other elements, like the rules of evidence, and the prosecutor's burden of proof, are either identical or very similar to the federal model.¹²⁷ The sections analyzing the defense and the appellate procedure are meant to determine whether the military compensates for a five-member panel by better protecting defendants in these two areas. The analysis of each section will pay specific attention to the requirements or

120. *Id.* art. 73.

121. See O'Connor, *supra* note 35, at 201-02.

122. *Solorio v. United States*, 483 U.S. 435 (1987). This was a reversal of the Court's previous rulings. See *O'Callahan v. Parker*, 395 U.S. 258 (1969) (holding that the crime must be service related to try an active-duty service member).

123. *Solorio*, 483 U.S. at 450-51.

124. See *infra* Part II.B.

125. See *infra* Part II.C.

126. See *infra* Part II.D.

127. The military uses the civilian Federal Rules of Evidence as long as they are not inconsistent with military justice. MCM, *supra* note 16, Military Rules of Evidence Rule 101. In convicting, a military court-martial must find that "guilt is established by legal and competent evidence beyond reasonable doubt." Uniform Code of Military Justice art. 51(c)(1), 10 U.S.C. § 851(c)(1) (2000).

procedures of capital trials. The three aspects will be analyzed through reference to three recent capital military cases, *United States v. Simoy*,¹²⁸ *United States v. Gray*,¹²⁹ and *United States v. Curtis*,¹³⁰ along with several non-capital cases. The capital cases were selected for their recentness and the full development of the appeals process. Of the three defendants, only Gray remains on death row.¹³¹ The other two have had their sentences commuted.¹³² Besides Gray, the only other current death row resident who had his appeal heard by an appellate court is Dwight Loving.¹³³ The other four—Walker, Parker, Kreutzer, and Quintanilla—have yet to have their appeals filed with an appellate court.¹³⁴

Before examining the relevant aspects of the trial process in military and federal systems, this part begins with a discussion of the facts of the capital cases to illustrate the character of capital crimes in the military. The civilian nature of these crimes is important in Part III's discussion.¹³⁵ The following sections will illustrate some of the problems in the military and federal systems.

A. *The Facts of the Cases*

The facts of the cases of Senior Airman Simoy, Specialist Gray, and Lance Corporal Curtis are disturbing, but similar to crimes committed in the civilian world. They are a result of motives found in civilian life like greed, anger, or hatred. It is important to emphasize that these crimes were not military in nature, and that some did not even occur on military property. They were in a military court only because the accused had been active service members at the time of the crime and trial.

1. Senior Airman Jose F. S. Simoy, U. S. Air Force

Senior Airman Jose Simoy was stationed on Andersen Air Force Base, Guam, as a law enforcement security policeman.¹³⁶ On December 29, 1991, Simoy, his brother Dennis, Dennis's friend Che Wolford, and two Filipinos nicknamed Nito and Tickboy robbed a commissary worker making a night deposit. Wolford pointed a rifle at Sgt. Stacy LeVay, who was accompanying the commissary worker,

128. 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

129. 51 M.J. 1 (C.A.A.F. 1999).

130. 52 M.J. 166 (C.A.A.F. 1999).

131. *Gray v. United States*, 532 U.S. 919 (2001) (denying certiorari); *see infra* notes 247-49 and accompanying text.

132. *See United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997).

133. *See supra* text accompanying notes 89-93.

134. *See supra* text accompanying note 9.

135. *See infra* Part III.

136. *United States v. Simoy*, 46 M.J. 592, 599 (A.F. Ct. Crim. App. 1996).

and ordered him to freeze. Sgt. LeVay spun around and grabbed the gun. While they were fighting over it, Dennis hit Sgt. LeVay in the back of the head with a pipe. Sgt. LeVay fell to the ground where Dennis beat him to death. Nito and Tickboy attacked the commissary worker. One punched her in the stomach, knocking her down. The other grabbed the bag of money. They hopped into the car Simoy was driving and sped away. When they realized they left Dennis behind, they went back to get him.¹³⁷

While waiting for Dennis, the group noticed a man had pulled up behind them and was checking some papers in his car.¹³⁸ Wolford asked Simoy if they had to kill him. Simoy answered yes. One of the Filipinos got out with a knife and stabbed Sgt. Donald P. Marquardt in the chest. He also slashed his neck just missing the trachea. He ran back to the car and the men sped away. About two weeks later, Simoy was found and arrested.¹³⁹ The trial lasted for two weeks, after which, the eight-member panel convicted Simoy of conspiring to rob the commissary worker, to murder Sgt. LeVay, to rob Sgt. LeVay of his pistol and radio, and to attempt the murder of Sgt. Marquardt.¹⁴⁰ Simoy was sentenced to death.¹⁴¹

2. Specialist Four, Ronald A. Gray, U. S. Army

In January 1987, the roommate of Kimberly Ann Ruggles became concerned about her absence.¹⁴² The roommate told the authorities that Ruggles, a cab driver, had gone to pick up a fare named Ron.¹⁴³ Ruggles never returned home. On January 7, 1987, two military policemen spotted an abandoned cab near the tree line on Fort Bragg. Several hours later they found Kimberly's body in the woods, not far from the car.¹⁴⁴

She was face down with her hands tied behind her back, nude except for her socks. She had been raped, sodomized, stabbed, and suffered bruises and cuts on her face.¹⁴⁵ The evidence, including fingerprints, implicated Ronald Gray.¹⁴⁶ Ten days later, a soldier discovered the body of Private Laura Lee Vickery-Clay.¹⁴⁷ She had been severely beaten, shot several times while still alive, raped, and

137. *Id.* at 600.

138. *Id.*

139. *Id.* at 600-01.

140. *Id.* at 601.

141. *Id.*

142. *United States v. Gray*, 37 M.J. 730, 735 (A.C.M.R. 1992). The court in this opinion gives only the victims' initials. However, they are identified by name in the appeal. *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999).

143. *Gray*, 37 M.J. at 735-36.

144. *Id.* at 736.

145. *Id.*

146. *Id.*

147. *Id.*

sodomized. The murder weapon and evidence found on her car also implicated Gray.¹⁴⁸ Later, a third victim recognized Gray's picture when it appeared in the newspaper and on television after his arrest.¹⁴⁹ Gray had attacked her in her barracks room. He held a knife to her throat, tied her hands behind her back with the cord of a curling iron, raped her, and stabbed her several times in the side and neck.¹⁵⁰

Gray was convicted before a general court-martial of attempted murder, two specifications of premeditated murder, three specifications of rape, larceny, two specifications of robbery, two specifications of forcible sodomy, and burglary. He was sentenced to death.¹⁵¹

3. Lance Corporal Ronnie A. Curtis, U.S. Marine Corps

Corporal Ronnie Curtis worked as a supply administrative clerk at Camp Lejeune, North Carolina. Lieutenant James F. Lotz was his supervisor.¹⁵² During the two years they worked together, Curtis, an African American, began to believe Lotz was prejudiced towards him.¹⁵³ Lotz's black friends and acquaintances later refuted these accusations.¹⁵⁴

On April 13, 1987, Curtis went to his barracks after work and drank a pint of gin.¹⁵⁵ He then took a walk and began to think about his work situation. He decided to kill Lotz.¹⁵⁶ Curtis broke into the supply building and stole a seven-inch knife;¹⁵⁷ he then stole a bicycle and rode the bike to Lotz's house.¹⁵⁸

When he got there he told Lotz that a soldier who worked in the supply building needed help with his automobile. When Lotz went to call for help, Curtis stabbed him in the chest.¹⁵⁹ Lotz then called for his wife before being stabbed a second time in the back.¹⁶⁰ Joan Lotz emerged from the bedroom and went to her dying husband. She then attacked Curtis, kicking him in the shin with her bare feet.¹⁶¹ Curtis assaulted Joan, stabbing her in the head, neck, and back as she

148. *Id.*

149. *Id.* at 736.

150. *Id.*

151. *Id.* at 733.

152. *United States v. Curtis*, 28 M.J. 1074, 1077 (N-M.C.M.R. 1989).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1078.

160. *Id.*

161. *Id.*

pleaded for him to stop.¹⁶² As she lay dying on the floor, Curtis cut off her panties and touched her vaginal area.¹⁶³

Curtis then stole some money and fled in one of the Lotz's cars.¹⁶⁴ While driving, he fell asleep at the wheel and crashed into a ditch. When the police questioned him about the accident, he confessed to the murders.¹⁶⁵ Curtis was convicted by a general court-martial of two premeditated murders, larceny, burglary, unlawful entry, indecent assault, and damage to government property.¹⁶⁶ He was sentenced to death.¹⁶⁷

B. *The Jury*

This section compares the federal and military jury systems. While the federal model uses jurors and the military model uses court-martial members to ascertain guilt, they are identical in purpose. By analyzing the jury in terms of composition, voting, and empanelment, this section will illustrate fundamental differences between the two systems.

1. Composition and Jury Voting

A civilian jury in federal court is governed first by the Constitution, and second by federal statute.¹⁶⁸ Twelve jurors are required in a federal capital trial.¹⁶⁹ There are six alternate jurors.¹⁷⁰ After the jury has retired to consider the verdict, one juror can be dismissed for just cause.¹⁷¹ There must be a unanimous vote to convict or acquit.¹⁷²

Prior to the recent passage of Article 25a,¹⁷³ general courts-martial consisted of at least five members (the civilian equivalent of jurors) and a military judge.¹⁷⁴ Conviction and sentencing by less than twelve members in capital cases was common. An eight-member panel sentenced Jose Simoy.¹⁷⁵ A six-member panel sentenced Ronald Gray.¹⁷⁶ Voting is done by secret ballot.¹⁷⁷ The result of the first

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 1076.

167. *Id.* at 1077.

168. See James C. Cissell, *Federal Criminal Trials* § 12-2 (5th ed. 1999).

169. Fed. R. Crim. P. 23(b).

170. *Id.* 24 (c).

171. Cissell, *supra* note 168, § 12-2(a).

172. Fed. R. Crim. P. 31(a).

173. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012, 1124 (2001).

174. Uniform Code of Military Justice art. 16, 10 U.S.C. § 816 (2000).

175. Sullivan, *supra* note 36, at 4 n.5.

176. See *id.* The number of panel members in Curtis's trial could not be determined from the published cases.

177. Uniform Code of Military Justice art. 51.

ballot is the verdict.¹⁷⁸ This vote is preceded by a discussion of the case amongst the panel members. Like the federal system, the panel must find guilt beyond a reasonable doubt.¹⁷⁹ In capital cases there must be separate, unanimous votes on guilt, the presence of an aggravating factor, the outweighing of mitigating circumstances by aggravating circumstances, and the sentence of death.¹⁸⁰

2. Impaneling the Jury

Selection of a federal jury must be done randomly.¹⁸¹ Additionally, a defendant can object if a distinctive group is excluded from the jury.¹⁸² To prevail the defendant must show the group is not fairly represented "due to systematic exclusion" in the jury selection process.¹⁸³ The defense can also challenge the composition of the jury when jurors are selected in an intentionally discriminatory manner.¹⁸⁴ To prove this a defendant must show "substantial underrepresentation of the class to which he belongs."¹⁸⁵

The prosecution and the defense can question jurors during voir dire to help secure a fair and impartial jury.¹⁸⁶ Both sides can use challenges for cause, which are granted by the judge, and peremptory challenges, which may be used without explanation or justification.¹⁸⁷ Each side has twenty peremptory challenges in capital cases.¹⁸⁸ Challenges for cause can be granted if a juror fails to meet statutory requirements, is biased, would suffer undue hardship, or would threaten the secrecy of the trial.¹⁸⁹ In capital cases, jurors cannot be dismissed based on their conscientious scruples against capital punishment, so long as they are able to render an impartial verdict.¹⁹⁰

In general courts-martial, the convening authority selects the potential court-martial members.¹⁹¹ The convening authority is usually given a broad presumption of propriety in compiling court-

178. *See id.* art. 52.

179. *Id.* art. 51(c)(1).

180. *Id.* art. 52(b)(1); MCM, *supra* note 16, Rules for Court-Martial 1004(a)(2), 1004(b)(7), 1004(b)(4)(C), 1006(d)(4)(A).

181. *See Cissell, supra* note 168, § 12-4.

182. *See id.* § 12-4(a). A distinctive group is a legal term defined by the courts. Hispanics are a distinctive group but persons between eighteen and twenty-one years of age are not. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* § 12-4(b).

187. *Id.* § 12-4(d).

188. Fed. R. Crim. P. 24(b).

189. *See Cissell, supra* note 168, § 12-4(c).

190. *Id.*

191. Shanor & Terrell, *supra* note 103, at 115; *see also supra* text accompanying note 109.

martial members.¹⁹² This presumption can be overcome by showing the convening authority systematically excluded potential members from serving¹⁹³ or picked members to help the prosecution.¹⁹⁴ “An appearance that the convening authority handpicked members to favor the prosecution may provide sufficient evidence to infer such intent.”¹⁹⁵ When picking members to serve, the convening authority must select possible members who are “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”¹⁹⁶

Voir dire in the military is different than the federal system because removed members will not be replaced unless the composition of the panel goes below quorum (five).¹⁹⁷ Like the federal system, the defense and trial counsel (the military equivalent of the prosecutor) have for cause and peremptory challenges.¹⁹⁸ The trial counsel, however, only gets one peremptory challenge regardless of the number of defendants, while the defense gets one peremptory challenge for each defendant.¹⁹⁹

3. Comparison

The composition and selection of a panel is substantially different in the military than in the federal system. The military defense attorney must choose to either remove panel members who are perceived as hostile or leave them on the panel, thereby increasing the chances the verdict will not be unanimous. The federal jury is fixed at twelve so the defense has no incentive to keep prejudicial jurors. Also, a federal defense attorney has twenty peremptory challenges,²⁰⁰ the military defense attorney has one for each defendant.²⁰¹ The convening authority, who also brings the charges against the defendant, handpicks the panel members.²⁰² Jurors in the federal system are chosen randomly, outside the control of the prosecution.²⁰³

192. See Matthew J. McCormack, Book Note, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 *Geo. Mason L. Rev.* 1013, 1036 (1999).

193. See *id.*

194. *Id.* at 1037.

195. *Id.*

196. Uniform Code of Military Justice art. 25, 10 U.S.C. § 825(d)(2) (2000).

197. *Id.* art. 41.

198. MCM, *supra* note 16, Rules for Courts-Martial 912.

199. See Robinson O. Everett, *Military Justice in the Armed Forces of the United States* 176 (Greenwood Press 1976) (1956).

200. See Cissell, *supra* note 168, § 12-4(d).

201. See Everett, *supra* note 199, at 176.

202. Shanor & Terrell, *supra* note 103, at 102.

203. See Cissell, *supra* note 168, § 12-4.

4. The Danger of Court-Stacking and Command Influence

Two peculiar problems arise out of the military approach to juries: court-stacking and command influence.²⁰⁴ They are both a result of the close relationship between the accuser (the convening authority) and the trier of fact (panel members chosen by the accuser). The problem can go undetected for a long time. Several non-capital cases have been thrown out by the military appellate courts for court-stacking or unlawful command influence.

In *United States v. Youngblood*, the CAAF set aside the sentence because biased members were not removed for cause during voir dire.²⁰⁵ Ten days before the trial, several panel members attended a staff meeting where the convening authority and the Staff Judge Advocate ("SJA") discussed the state of discipline in the unit.²⁰⁶ The convening authority also expressed his opinion of appropriate levels of punishment.²⁰⁷ The SJA told a story about a soldier who, according to the SJA, did not decide the sentence in a child abuse case properly. The convening authority said he had handled the matter by telling the soldier's next commanding officer that the soldier's career was at its peak and he should not be promoted any more.²⁰⁸

In another case, *United States v. Reynolds*, the convening authority expressed to four soldiers his dissatisfaction with previous courts-martial results.²⁰⁹ He also expressed his opinion that anyone involved with drugs did not belong in the military.²¹⁰ Reynolds was charged with a drug offense, pled guilty, and was sentenced by a special court-martial that included those four soldiers.²¹¹

United States v. Hilow is a good example of court stacking.²¹² In that case nominees were selected because they were "commanders and supporters of a command policy of hard discipline."²¹³ *Hilow* also presents a different problem—someone other than the convening authority compiled the list of nominees, thus demonstrating the broad

204. See Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1, 45-54 (1998). Court-stacking is done by impaneling members whom the convening authority thinks will vote a certain way. *Id.* at 45. Command influence occurs when the convening authority tries implicitly or explicitly to persuade panel members to vote a certain way.

205. *United States v. Youngblood*, 47 M.J. 338, 341-42 (C.A.A.F. 1997); see Glazier, *supra* note 204, at 61-62.

206. *Youngblood*, 47 M.J. at 339.

207. *Id.* at 340.

208. *Id.*; Glazier, *supra* note 204, at 62.

209. *United States v. Reynolds*, 40 M.J. 198, 199-200 (C.M.A. 1994); Glazier, *supra* note 204, at 65.

210. *Reynolds*, 40 M.J. at 200; see Glazier, *supra* note 204, at 65.

211. *Reynolds*, 40 M.J. at 198-99; see Glazier, *supra* note 204, at 65.

212. *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991).

213. *Id.* at 441.

range of individuals capable of stacking a panel.²¹⁴ There was no evidence the convening authority meant to engage in court stacking, but the chosen potential members were already tainted.²¹⁵ In another case, *United States v. McClain*, the SJA only recommended senior officers and non-commissioned officers to the convening authorities.²¹⁶ He wanted to avoid the lighter sentences he thought junior officers and enlisted men gave.²¹⁷ These abuses do not arise in the federal system, where the jury is chosen through an anonymous and random process.

C. *The Defense*

This section analyzes the way accused are defended in the different systems. The defense of the accused is one of the most important aspects of a trial. Only through an effective, rigorous defense can a reliable verdict be achieved. The defense is examined through the quality of defense counsel and the right to a grand jury or Article 32 hearing.

1. Quality of Counsel

There are rules for assignment of counsel in federal cases.²¹⁸ Each United States district court must institute a plan for furnishing representation for defendants who cannot afford it.²¹⁹ The plan must include the appointment of private attorneys or attorneys from a bar association, a legal aid society, a federal public defender organization, or a community defender group.²²⁰ The right to representation covers the entire process from initial appearance through appeal, including all ancillary matters.²²¹ In capital cases a judge must promptly, on defendant's request, "[a]ssign [two] such counsel, of whom at least [one] shall be learned in the law applicable to capital cases."²²²

Defense counsel in the military is provided to the accused in all general courts-martial, while associate counsel is optional.²²³ Defense attorneys must also be a member of the federal bar or bar of the highest court of the state and be certified as competent to perform their duties by TJAG for the appropriate branch of the armed

214. *Id.*

215. See Glazier, *supra* note 204, at 45-46.

216. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986).

217. *Id.* at 130; Glazier, *supra* note 204, at 51.

218. 18 U.S.C. § 3006A (2000).

219. *Id.* § 3006A(a)

220. See *id.* § 3006A(b).

221. *Id.* § 3006A(c).

222. *Id.* § 3005.

223. Uniform Code of Military Justice art. 27, 10 U.S.C. § 827 (2000).

services.²²⁴ At either the trial or appellate stage, the defendant may hire his own civilian counsel.²²⁵

Military defense counsel may be more experienced in trial advocacy than the prosecutors.²²⁶ For example, in the Air Force, "JAGs who acquire sufficient litigation experience, expertise, and skill as prosecutors may request to be a defense counsel."²²⁷ Nevertheless, death penalty cases in the military "always include claims that the defense lawyer was incompetent."²²⁸ These claims have had varying degrees of success.²²⁹ The military does not require defense counsel to be ABA "death-qualified."²³⁰

2. The Grand Jury; Article 32

The Fifth Amendment guarantees a civilian accused of a capital crime the right of a grand jury hearing.²³¹ To indict, there must be a finding of probable cause.²³² The government attorney has no obligation to present evidence that may be exculpatory or undermine their own witnesses.²³³ The government attorneys, the witnesses, an interpreter when needed, and a stenographer may be present during the grand jury proceedings.²³⁴ The presence of unauthorized persons may void a grand jury's indictment.²³⁵

The military system uses a pretrial investigation, referred to as an Article 32 hearing²³⁶ instead of a grand jury. This is constitutional because the Fifth Amendment explicitly does not apply to the military.²³⁷ During an Article 32 hearing, the accused is present and has the right to counsel, the right to cross-examine government

224. *Id.*

225. *Id.* arts. 38(b)(2), 70(d).

226. See Telephone Interview with Col. Adele H. Odegard, Chief, Defense Appellate Division (Nov. 19, 2001) (stating defense attorneys are usually not right out of school) (notes on file with the *Fordham Law Review*).

227. The Judge Advocate General's Office, U.S. Air Force, United States Air Force JAG: Immediate Challenge, Unlimited Opportunity 7 (2001).

228. *United States v. Simoy*, 46 M.J. 592, 623 (A.F. Ct. Crim. App. 1996).

229. Compare *United States v. Gray*, 51 M.J. 1, 18 (C.A.A.F. 1999) (holding that counsel was not ineffective), and *United States v. Simoy*, 46 M.J. 592, 607 (A.F. Ct. Crim. App. 1996) (same), with *United States v. Murphy*, 50 M.J. 4, 9 (C.A.A.F. 1998) (finding counsel ineffective), and *United States v. Curtis*, 46 M.J. 129, 130 (C.A.A.F. 1997) (same).

230. *United States v. Curtis*, 44 M.J. 106, 126 (C.A.A.F. 1996) ("This Court has rejected a requirement for appointment of ABA qualified counsel. . .").

231. See U.S. Const. amend. V.

232. See Cissell, *supra* note 168, § 4-1.

233. See *id.* § 4-4.

234. Fed. R. Crim. P. 6(d)(1).

235. See Cissell, *supra* note 168, § 4-2(g).

236. Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (2000).

237. See U.S. Const. amend. V. The Sixth Amendment also does not apply to the military, but for less clear reasons. See generally Eugene M. Van Loan III, *The Jury, The Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972).

witnesses, and the right to present anything that goes towards a defense or mitigation.²³⁸ This is vastly different than the federal grand jury where the defendant may not even be present. Military defense attorneys may either use the Article 32 hearing to put on a full-fledged defense to prevent charges from being forwarded to trial or simply appraise the prosecution's case.²³⁹ After the hearing, the investigating officer makes a recommendation about what should be done next so as to further justice and discipline.²⁴⁰ Either way, a non-verbatim transcript of the Article 32 hearing cannot be used in the court-martial proceedings.²⁴¹

3. Comparison

While the military defense attorney may have more trial experience, this does not, by definition, translate into more capital trial experience. The burden of trying a capital case is very different than the burden of trying a non-capital one.²⁴² One obvious difference is the possible death of the defendant. There are other considerations as well. The cases of defendants facing the death penalty tend to be horrific and violent.²⁴³ A military capital case is also the only military trial to require a unanimous verdict.²⁴⁴ The federal system requires that one of the defendant's lawyers have knowledge of the capital law—arguably not a high standard. The military does not.²⁴⁵

Facially, an Article 32 investigation gives the accused a chance to disprove the charge before the case even goes to trial, but there is no concrete standard of proof required of the prosecution; it is simply to further justice and discipline.²⁴⁶ A grand jury, on the other hand, hears only the prosecutor's argument. This can make it easier to indict in the federal system.

4. The Problem of Ineffective Counsel

This section illustrates some of the problems with the military and federal systems. These problems may be great enough to prevent the military from providing a more reliable system of defense than a flawed, but capable federal system.

238. Uniform Code of Military Justice art. 32(b).

239. Telephone Interview with Col. Adele H. Odegard, Chief, *supra* note 226.

240. Uniform Code of Military Justice art. 32.

241. *United States v. Douglas*, 1 M.J. 354, 356 (C.M.A. 1976).

242. For instance, in a capital trial, the more panel members, the better the chance at avoiding the death penalty. In a non-capital general courts-martial, where the verdict is not unanimous, a larger panel is not necessarily an advantage. *See infra* text accompanying note 356.

243. *See supra* Part II.A.

244. Uniform Code of Military Justice art. 52.

245. *United States v. Curtis*, 44 M.J. 106, 126 (C.A.A.F. 1996).

246. Uniform Code of Military Justice art. 32(a).

The CAAF found such egregious ineffectiveness of counsel in *United States v. Curtis* that it set aside the sentence.²⁴⁷ The CAAF also found ineffective counsel in both the trial phase and sentencing in one case, *United States v. Murphy*.²⁴⁸ Jose Simoy's case presents an example of trial experience not necessarily preparing a defense attorney for a capital trial. In an affidavit, Simoy's attorney, Major Doyle, supported Simoy's claim of ineffective counsel, stating, "our efforts were sufficient for a non-capital felony court-martial, [but] we failed to perform up to the professional standards I have since realized are necessary in the representation of a capital case."²⁴⁹

The attorneys in Simoy's case had varying degrees of trial experience but neither was well-versed in capital litigation. Captain Bemis was the installation defense counsel and had tried some courts-martial, although the record does not indicate the nature of these courts-martial.²⁵⁰ Captain Bemis also worked as a civilian attorney for about one year handling some misdemeanor criminal cases.²⁵¹ Major Doyle was assigned to Air Force members who had committed more serious crimes.²⁵² Before the Simoy case, he had defended or prosecuted between thirty and forty trials and worked as an appellate defense attorney on about 200 cases.²⁵³ By Doyle's own admission, however, this experience did not adequately prepare him for a capital trial. Two former high-ranking officers in the Army JAGC, Michael I.

247. *United States v. Curtis*, 46 M.J. 129, 130 (C.A.A.F. 1997) (finding ineffective counsel for failure to present mitigating factors in the sentencing phase). The court then ordered the case remanded to the Navy-Marine Corps Court of Criminal Appeals for imposition of a life sentence or a rehearing on sentencing. *Id.*

248. 50 M.J. 4 (C.A.A.F. 1998). The court held that post-trial evidence cast doubt on the defendant's ability to form premeditation and whether the defendant had a fair sentencing hearing. The case was returned to the Army Court of Criminal Appeals, which could do several things:

- (1) Review the new evidence to determine if a different verdict as to findings might reasonably result in light of posttrial evidence;
- (2) If it determined that the record before it is inadequate to resolve the factual issues regarding findings, it may order a *DuBay* hearing to consider the factual issues raised on appeal as to the findings;
- (3) If it determines that a different verdict would not reasonably result as to findings, then it may either affirm appellant's sentence only as to life imprisonment and accessory penalties, or it may order a rehearing as to the death sentence;
- (4) If it determines that a different verdict on findings might reasonably result, then it shall order a rehearing on findings and sentence;
- (5) If on remand the Court of Criminal Appeals determines that further review under Article 66 is impracticable, then in the interest of judicial economy, it may order forthwith a rehearing on findings and sentence.

Id. at 16 (citations omitted).

249. *United States v. Simoy* 46 M.J. 592, 603 (A.F. Ct. Crim. App. 1996) (emphasis omitted). Simoy's death sentence was eventually set aside for faulty jury instructions. *United States v. Simoy*, 50 M.J. 1, 3 (C.A.A.F. 1998).

250. *Simoy*, 46 M.J. at 602.

251. *Id.*

252. *Id.*

253. *Id.*

Spak and Jonathon P. Tomes, have also commented on the inexperience of military defense counsel. They wrote, "we agree that [military defense counsel] are generally too inexperienced today to entrust with representing service members before general courts-martial in death penalty or life imprisonment cases."²⁵⁴

Simoy's case also demonstrates the arguably illusory advantage an Article 32 hearing has over a grand jury.²⁵⁵ During Simoy's Article 32 hearing, two government witnesses were more than a hundred miles away, so the investigating officer, rather than compelling them to appear, considered their prior sworn statements.²⁵⁶ The Air Force Court of Criminal Appeals ("AFCCA") held that the one hundred mile standard for not requiring a witness to appear as stated in Rules for Court Martial 405(g)(1)(A) was not a bright-line rule.²⁵⁷ It was supposed to be weighed against the importance of the witness.²⁵⁸ This weighing was not done in Simoy's case. However, the court found it harmless error because the defense did not move to depose the witnesses and thereby preserve the right to appeal that issue.²⁵⁹ The AFCCA did not put much bite into a defendant's right to examine witnesses for the prosecution during an Article 32 hearing. The CAAF upheld the court's decision.²⁶⁰

Of course, ineffective counsel in capital cases plagues the civilian system as well. While this section focuses on the federal criminal system, the use of federal habeas corpus proceedings have caused federal courts to rule on claims of ineffective counsel from state capital trials. Justice Blackmun, in his dissent to a denial of certiorari in *McFarland v. Scott*,²⁶¹ strongly criticized the public-defender system for its lack of resources and lack of standards for counsel in death-penalty cases.²⁶² Justice Blackmun also criticized the relatively high threshold for finding ineffective counsel.²⁶³ "Ten years after the articulation of that standard, practical experience establishes that the . . . test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be

254. Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 Sw. U. L. Rev. 481, 525 (1999).

255. See *Simoy*, 46 M.J. at 608.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *United States v. Simoy*, 50 M.J. 1, 2 (C.A.A.F. 1998).

261. 512 U.S. 1256 (1994).

262. *Id.* Justice Blackmun noted that public defenders in Louisiana were limited in capital cases to \$1000 to pay for pretrial preparation and the trial, Kentucky's maximum was \$2500 and Alabama offered \$1000 for each part. *Id.* at 1258.

263. *Id.* at 1259; see also *Strickland v. Washington*, 466 U.S. 668 (1984) (articulating a high threshold for finding counsel so ineffective that the Sixth Amendment was violated).

a lawyer.”²⁶⁴ Justice Blackmun gave a laundry list of outrageous defense counsel behavior in several capital trials:

Capital defendants have been sentenced to death when represented by counsel who never bothered to read the state death penalty statute, [who] slept through or otherwise were not present during trial, or failed to investigate or present any mitigating evidence at the penalty phase . . . who had been admitted to the bar only six months before and never had conducted a criminal trial. . . . [Who conducted] a [one]-day trial and [twenty]-minute penalty phase proceeding, in which . . . counsel stipulated to the defendant’s age at the time of the crime and rested. . . . [And] who failed to challenge his client’s racially unrepresentative jury [and] could name only two cases: *Miranda v. Arizona* and *Dred Scott v. Sandford*.²⁶⁵

Justice Blackmun also cited to one particularly egregious case where the defense attorney presented no defense, did not object during the trial, stressed the horror of the crime during closing arguments, and, argued during sentencing that death was appropriate.²⁶⁶

D. Appellate Procedure

This section focuses on the appellate process, in particular, its purpose and scope of review. This is the last safeguard for a convicted person’s rights. In the three capital cases discussed below, two defendants had their death sentences commuted to life imprisonment and one had his death sentence upheld. This section will illustrate that the two systems, military and federal, reach similar results through different processes.

1. The Appellate Process

The Constitution and federal law govern appeals from a final judgment in federal court.²⁶⁷ The circuit courts have appellate jurisdiction over such final judgments.²⁶⁸ These appeals are a right guaranteed to the defendant. The Supreme Court has discretionary jurisdiction. It can decide to review a capital case but is not compelled to do so.²⁶⁹

In the military, after completion of the trial, the commander who convened the court-martial must affirm the court’s actions.²⁷⁰ The commander cannot change a finding of not guilty, but is authorized to disagree with a finding of guilty, and can reduce, mitigate, or

264. *McFarland*, 512 U.S. at 1259 (quoting *Strickland*, 466 U.S. at 685).

265. *Id.* (citations omitted).

266. *Id.* at 1260 (citing *Messer v. Kemp*, 760 F.2d 1080 (11th Cir. 1985)).

267. See *Tigar*, *supra* note 23, § 2.02; see also 28 U.S.C. § 1291 (1994).

268. 28 U.S.C. § 1291.

269. See *Tigar*, *supra* note 23, § 2.01.

270. See Uniform Code of Military Justice art. 60, 10 U.S.C. § 860 (2000).

disapprove any sentence or part of a sentence.²⁷¹ The SJA, the prosecutor's commanding officer, must also write a review.²⁷² After a capital trial, the entire record, including the outcome of the case and the SJA's opinion must be sent to TJAG of the defendant's military branch.²⁷³ TJAG conducts an administrative review to determine if the law supports the findings and sentence.²⁷⁴ All cases involving sentences of death must be referred to the Court of Criminal Appeals for the defendant's service branch.²⁷⁵ The court must consist of a minimum of three judges who are commissioned officers or civilians, members of the federal bar or the bar of the highest state court, and appointed by their service branch's TJAG.²⁷⁶ The judges are usually senior JAG officers.²⁷⁷

If a Court of Criminal Appeals affirms the sentence of death, the Court of Appeals for the Armed Forces hears the case.²⁷⁸ The court is comprised of five civilian judges, appointed by the President and approved by the Senate for staggered fifteen-year terms.²⁷⁹ The Supreme Court can review the case by writ of certiorari.²⁸⁰

2. Purposes and Scope of Review

Appellate review in the federal and military systems is designed to serve as a safeguard, not a second trial.²⁸¹ Consequently, in the federal system facts are rarely re-examined except to determine if they support the verdict.²⁸² A federal appellate court will review questions of fact under a "clearly erroneous" standard.²⁸³ Issues of law are examined under a more relaxed "merely wrong" standard.²⁸⁴

In federal death-penalty cases, an appellate court reviews the entire record to determine if the "sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the special finding of the existence of an aggravating factor."²⁸⁵ If the court finds the sentence was imposed

271. *Id.* art. 60(e)(2). The convening authority cannot reconsider a finding of not guilty or increase the severity of the sentence unless that sentence is mandatory. *Id.*

272. *Id.* arts. 61, 65.

273. *Id.* art. 65.

274. Shanor & Terrell, *supra* note 103, at 128.

275. Uniform Code of Military Justice art. 66(b).

276. *Id.* art. 66(a).

277. Shanor & Terrell, *supra* note 103, at 128-29.

278. Uniform Code of Military Justice art. 67(a)(1).

279. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1301, 103 Stat. 1352, 1569-78 (1990).

280. Uniform Code of Military Justice art. 67a.

281. See Alan D. Hornstein, Appellate Advocacy in a Nutshell 31 (1984); see also Uniform Code of Military Justice art. 66(c).

282. Hornstein, *supra* note 281, at 31.

283. *Id.* at 33.

284. *Id.* at 34-35.

285. 18 U.S.C. § 3595(c)(1) (2000).

under the influence of a prohibited factor, the finding of an aggravating factor was not supported by the admissible evidence, or there was any other properly preserved error that affected sentencing, the court can remand for a new hearing to determine whether a sentence of death was justified or for imposition of a penalty other than death.²⁸⁶

The military appellate courts conduct a similar type of review,²⁸⁷ however, the Courts of Criminal Appeals have broader powers of review and can consider questions of fact, credibility of witnesses, the weight of evidence, and all questions of law.²⁸⁸ The CAAF considers only issues of law,²⁸⁹ but can set aside the findings and the sentence, order a new hearing, or set aside the sentence.²⁹⁰

3. Comparison

The military system has more levels of review than the federal system. Before an appellate court hears a case, the convening authority, the SJA and TJAG all examine the trial record and the sentence. The Courts of Criminal Appeals also have greater power than their federal counterparts because they can determine questions of fact, reliability of witnesses, and evidence. However, the judges on this court are appointed by their respective service branch's TJAG;²⁹¹ the President appoints federal appellate court judges. The scope and purpose each appellate system undertakes in capital cases is nearly identical.

4. The Strength of the Appellate Process

This section illustrates some of the problems that can occur in the military and federal appellate systems. Ronald Curtis's case is a good example of a Court of Criminal Appeals not affording the best protection to the defendant. The Navy-Marine Corps Court of Criminal Appeals ("N-MCCA") and the CAAF affirmed Curtis's death sentence twice²⁹² before the sentence was thrown-out by the CAAF on reconsideration.²⁹³ The first time the N-MCCA affirmed, the CAAF, on appeal, remanded the case back for a review of several other issues.²⁹⁴ After the second affirmation by the N-MCCA, the

286. *Id.* § (c)(2).

287. *See* *United States v. Simoy* 50 M.J. 1, 2 (C.A.A.F. 1998).

288. Uniform Code of Military Justice art. 66(c).

289. *Id.* art. 67(c).

290. *Id.* art. 67(d).

291. *See supra* text accompanying notes 110-11.

292. *United States v. Curtis*, 38 M.J. 530 (N-M.C.M.R. 1993); *United States v. Curtis*, 28 M.J. 1074 (N-M.C.M.R. 1989).

293. *United States v. Curtis*, 46 M.J. 129, 130 (C.A.A.F. 1997).

294. *See Curtis*, 38 M.J. at 532.

CAAF affirmed the N-MCCA's decision on the death sentence.²⁹⁵ The N-MCCA did not find defense counsel rose to a level of ineffectiveness that the CAAF did when it ultimately reversed the lower court.²⁹⁶ This illustrates that in practice the added level of appellate review in the military may be illusory.

The United States courts of appeal have been criticized on two fronts: their inability to handle an increasing caseload and their "excessively ideological" decisions.²⁹⁷ The increased caseload has led to reduced time for oral arguments and deciding cases in nonprecedential order.²⁹⁸ Some critics have called the appellate courts "appellate factories."²⁹⁹ Making decisions based on ideological reasons instead of on the merits may benefit some defendants sentenced to death, but it also may cause a backlash with more conservative justices. This happened with Supreme Court justices after the Court's decision to reinstate the death penalty in 1976.³⁰⁰ Justices Marshall and Brennan, ideologically opposed to the death penalty, began to "vote[] to reverse or vacate every death sentence that came before the Court."³⁰¹ The conservative backlash reduced the grounds for which defendants could seek federal habeas relief, a major avenue of appeal for people sentenced to death.³⁰²

This part compared the way the military and the federal system protect defendants facing the death penalty. Both systems use the appellate procedure to safeguard defendant's rights. Both systems, however, suffer from problems—particularly ineffective counsel. However, the military model places defendants at a distinct disadvantage because of how a panel is selected. Part III attempts to show that this shortcoming makes it necessary that military defendants in capital trials for non-military crimes be judged by twelve-member panels.

III. SHOULD MILITARY CAPITAL CASES HAVE A GUARANTEE OF TWELVE-MEMBER PANELS?

This part analyzes the National Defense Authorization Act for Fiscal Year 2002 and argues that the change in panel size for capital cases did not go far enough. The first section argues that two primary barriers, the outdated rationale for changing the panel size in 1786 and the denial of civilian protections to soldiers, no longer apply

295. *United States v. Curtis*, 44 M.J. 106, 116 (C.A.A.F. 1996).

296. *See Curtis*, 46 M.J. at 130.

297. Michael Abramowicz, *En Banc Revisited*, 100 Colum. L. Rev. 1600, 1604 (2000).

298. *See id.*

299. *See id.*

300. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

301. *Lazarus*, *supra* note 23, at 148.

302. *See id.* at 149.

today. Once these barriers are overcome, the military's failure to adequately protect the rights of the accused proves the necessity of twelve-member panels in capital trials for non-military crimes. If twelve-member panels are necessary, it becomes important to show why the new legislation is not adequate. The next section will illustrate how similarly written, previous legislation establishing thirteen-member panels was easily sidestepped. The Note concludes with a suggested UCMJ amendment that would guarantee no soldier is executed for murder and/or rape without first being convicted by twelve people.

A. Necessity of Twelve-Member Panels

This section begins with the contention that two barriers to increasing military panels have become obsolete. The first barrier is that the 1786 context in which five-member panels were adequate is no longer applicable today. Developments in the military have rendered the rationale for five-member panels a historical anomaly. The second barrier is the idea that incorporating civilian liberties into the military will hurt good order and discipline. The example of civilian protections being incorporated without great protest or condemnation in *United States v. Matthews*³⁰³ and *United States v. Tempia*³⁰⁴ refutes this notion. This section concludes with the argument that the military does not adequately protect an accused's rights in capital trials. This inadequacy demands that twelve people judge defendants in capital trials for civilian crimes.

The arguments made in this section could be extended to all capital crimes in the military. This is the approach taken by Article 25a.³⁰⁵ This Note, however, deals with only civilian crimes, specifically murder and rape. This is an important distinction because of the demands of military justice. All reforms to the UCMJ must not hurt good order and discipline in the armed forces.³⁰⁶ A strictly military crime, like spying or aiding the enemy, can hurt an entire unit and even weaken the country.³⁰⁷ The interests of good order and discipline are strong enough to outweigh the need for a twelve-member panel. The difference between a crime that injures a few, like murder, and a crime that can injure many, like spying, requires that the two be treated separately. Additionally, a central contention

303. 16 M.J. 354 (C.M.A. 1983).

304. 37 C.M.R. 249 (C.M.A. 1967).

305. See National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012, 1124 (2001).

306. MCM, *supra* note 16, pmbl.

307. Some other military capital crimes include: assaulting or willfully disobeying superior commissioned officer, mutiny or sedition, misbehavior before the enemy, subordinate compelling surrender, improper use of a countersign, and forcing a safeguard. Uniform Code of Military Justice arts. 90, 94, 99-102, 10 U.S.C. §§ 890, 894, 899-902 (2000).

of this Note is that service-members should not receive less protection than their civilian counterparts solely because of their occupation. With the possible exception of spying, none of the other military capital crimes have an equivalent civilian crime. Therefore, service members do not receive less protection merely because of their occupation; they receive less protection because of their crime.

1. The Historical Precedent

The Articles of War of 1775 required, without exception, that court-martial panels consist of thirteen officers.³⁰⁸ The amendment in 1786 created an exception to this requirement to allow smaller panels if thirteen-member panels would harm military service.³⁰⁹

Knox's request in 1785, which led to the amendment,³¹⁰ resulted from a concern with a shrinking army and its ability to convene thirteen officers without lowering the effectiveness of the military.³¹¹ While today's military has also downsized, the numbers are vastly different than in Knox's day. One historian has estimated the entire United States Army had fewer than forty officers in 1786.³¹² Three years later the Army had only 672 soldiers.³¹³ Impaneling thirteen officers would have constituted almost a third of the officer corps.

The small size of the Army was a result of several factors; the primary two will be discussed here. First, the United States had great trouble in repaying its debts, including the salaries of the soldiers, after the war.³¹⁴ Things got so bad, that in June 1783, a group of soldiers from Pennsylvania took their muskets and bayonets and surrounded the State House in Philadelphia where Congress was meeting.³¹⁵ Second, there was already a fear of standing armies rooted in the colonial experience;³¹⁶ the Philadelphia incident may have placed this concern in the forefront of public consciousness and given Knox little hope of an expanded military capable of meeting the minimum number of panel members. Today, the armed forces

308. American Articles of War of 1775, art XXXIII, *reprinted in* Winthrop, *supra* note 40, app. at 956.

309. American Articles of War of 1786, art 1, *reprinted in* Winthrop, *supra* note 40, app. at 972.

310. 29 Journals of the Continental Congress, *supra* note 42, at 851; *see supra* text accompanying note 42.

311. The impetus for Knox's request probably came from two courts-martial in Western Pennsylvania where the defendants' convictions for desertion had to be overturned because there were only five members on each panel. Sullivan, *supra* note 36, at 6 n.18.

312. *Id.* at 5 n.17.

313. *Id.* at 5 n.16.

314. *See* Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic 1776-1790*, at 58 (1965).

315. *Id.* at 69.

316. *See* Jack N. Rakove, *Original Meanings 150* (1996) (discussing Anti-Federalist fears of a standing army during the debates of 1787-88).

certainly have the resources to afford any service member on trial for his or her life the right to a jury of twelve.³¹⁷

There is another, more compelling, reason to disregard Knox's concerns—the difference in crimes for which a soldier can be sentenced to death. In 1786, all of the military crimes eligible for the death penalty were uniquely military in nature.³¹⁸ The military never prosecuted murder and rape in peacetime before 1950.³¹⁹ The UCMJ brought panel size and the death penalty together in a disastrous way for soldiers' civil rights. It removed the requirement that a panel have thirteen members whenever possible³²⁰ and added jurisdiction over murder and rape committed in peacetime.³²¹ Soldiers were prosecuted for civilian crimes—murder and rape—in a military court with no guarantee of twelve-member panels. Civilians were tried under federal or state law and guaranteed twelve jurors.³²²

This unfortunate result might have been a by-product of the piecemeal manner in which the UCMJ was compiled and ratified. The authors looked at each article from the Army Articles of War and the Rules for Governing the Navy individually.³²³ There is no indication that they were ever examined for their overall effect when combined.³²⁴ Congress likewise reviewed the articles in a piecemeal manner.³²⁵ It appears this critical question of panel size was never debated or even considered.

The added burden of prosecuting soldiers who commit a murder in peacetime, previously a uniquely civilian crime, was a momentous change in 1950. Knox's reasons for five-member panels certainly do not apply to prosecutions for peacetime murder and rape. Even without the change in 1950, the reasons for resizing were particular to the country and the military in 1786. The congressional passage of the UCMJ in 1950 does not support the current system because there is no record of congressional intent. The creation of a system where

317. In November 2001, there were over 200,000 officers in the armed forces and over 1.3 million enlisted men. Department of Defense, *Active Duty Military Personnel by Rank/Grade* (Nov. 2001), at <http://web1.whs.osd.mil/mmid/military/ms11.pdf>.

318. See O'Connor, *supra* note 35, at 188-89.

319. See *id.* at 192; see also Uniform Code of Military Justice art. 118, 10 U.S.C. § 918 (2000).

320. American Articles of War of 1786, art 1, reprinted in Winthrop, *supra* note 40, app. at 972.

321. See O'Connor, *supra* note 35, at 189, 192; see also Uniform Code of Military Justice art. 118.

322. See *supra* text accompanying note 169.

323. Generous, *supra* note 62, at 37.

324. See *id.*

325. See *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before the House Subcomm. on Armed Services, 81st Cong. 955-56 (1949)*. Discussion of the punitive articles, if any, would have occurred after the public hearings. *Id.* at 1307.

fewer than twelve people can sentence soldiers to death for non-military crimes was never discussed in subcommittee hearings before the Senate and the House of Representatives.³²⁶

2. Incorporating Civilian Protections into the Military

The rules of military justice must uphold the standards of good order and discipline.³²⁷ Any incorporation of civilian protections to the military system must meet this standard. Several decisions since 1950 vastly altered how the military prosecuted the accused and imposed the death penalty. These incorporations have not caused a great uproar over the decline of good order and discipline.³²⁸ There is good reason to believe a no-exceptions requirement of twelve-panel members in trials for capital, non-military crimes would also not affect good order and discipline.

There is, admittedly, a long tradition of keeping the military and civilian systems separate. General William T. Sherman said:

The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.³²⁹

Justice Rehnquist echoed this sentiment about one hundred years later:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."³³⁰

These statements acknowledge that giving civilian protections to soldiers must not hinder the effectiveness of the military. They *do not* mean civilian protections cannot be given to military members. In fact, the mission statement of the UCMJ is to make a new, modern code "with a view to protecting the rights of those subject to the code

326. See *id.*; *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before the Senate Subcomm. on Armed Services, 81st Cong. (1949).*

327. MCM, *supra* note 16, pmb1.

328. A thorough search revealed no negative reaction by military authorities to these decisions.

329. Van Loan, *supra* note 237, at 417 (citation omitted).

330. *Parker v. Levy*, 417 U.S. 733, 743 (1974) (citation omitted).

and increasing public confidence in military justice, without impairing the performance of military functions."³³¹

Two decisions to incorporate civilian protections into the military, *United States v. Matthews*³³² and *United States v. Tempia*,³³³ fundamentally altered the way military justice was administered to soldiers. However, the incorporation of these civilian protections did not create widespread condemnation among military lawyers or commentators and neither case has been overruled.³³⁴ If these protections were brought into the military system without problems, than there is similar hope for twelve-member panels. While *Matthews* and *Tempia* were based on already existing military rights,³³⁵ there is no reason to suppose that a no-exceptions requirement of twelve-panel members in capital trials for murder and rape would be difficult to institute or create a breakdown in good order and discipline. The military has already been able to prosecute two defendants with twelve-member panels, as it did with two current death-row inmates, Kreutzer and Quintanilla.³³⁶ A no-exceptions rule requiring twelve-member panels would affect only those service-members accused of murder and/or rape and facing the death penalty, a miniscule portion of all service members. Additionally, if the panel was not unanimous on the imposition of the death penalty, it could still convict with a two-thirds vote. The sentence would be life imprisonment—the statutory minimum.³³⁷ Such a rule would not require the prosecution to try murders as non-capital when the burden of twelve-panel members could not be met; in those situations, the soldier could be turned over to the civilian authorities for trial or moved to an installation that could impanel twelve soldiers.

3. Current Practice

The current military practice in capital cases does not meet the heightened standards that should accompany a decision to prosecute and execute soldiers who commit a civilian, capital crime.³³⁸ The military justice system is designed to further different goals than the civilian system. Good order and discipline are the principles to which

331. Generous, *supra* note 62, at 34.

332. 16 M.J. 354 (C.M.A. 1983); *see* discussion *supra* Part I.B.1.

333. 37 C.M.R. 249 (C.M.A. 1967); *see* discussion *supra* Part I.B.2.

334. *See supra* Part I.B.

335. The *Matthews* court based its decision partly on the fact the military already had an article banning cruel and unusual punishment, and *Furman* was decided on Eighth Amendment grounds. *Matthews*, 16 M.J. at 368-69; *see also* U.S. Const. amend VIII. The *Tempia* court based its decision partly on the existence of an article similar to the *Miranda* warnings. *Tempia*, 37 C.M.R. at 260.

336. Sullivan, *supra* note 36, at 4 n.5.

337. Uniform Code of Military Justice art. 118, 10 U.S.C. § 118 (2000).

338. The death penalty requires a higher standard of reliability. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *supra* Part II.B-D.

military justice must measure up.³³⁹ While good order and discipline justify less than twelve-member panels in military crimes like desertion or aiding the enemy,³⁴⁰ it fails to justify the systematic abuses that can occur during a military trial which can result in the death of a soldier for a civilian crime. The military particularly fails when it comes to the method by which a panel is chosen³⁴¹ and the accused is defended.³⁴² The appellate procedure provides a protection equal to the federal model,³⁴³ but it is not enough to make up for the other deficiencies.

It might be argued that since no soldier has been put to death since 1961,³⁴⁴ the system is working. Rather than providing an example of judicial prudence, this is probably a result of a judicially active CMA incorporating civilian protections in the 1960s and '70s³⁴⁵ and the 1983 *United States v. Matthews*³⁴⁶ decision, holding the military death penalty unconstitutional. Ronald Reagan, as commander-in-chief, remedied that problem by providing aggravating factors that must be present in order to sentence a person to death. Two of the first cases tried under that new rubric are now approaching the final stages of their appeals.³⁴⁷ The pause in executions may be at an end if President George W. Bush maintains the execution track record he established as governor of Texas.³⁴⁸

Panel selection, the biggest problem in military justice, can be divided into two sub-problems: command influence and stacking the panel.³⁴⁹ Command influence has proven to be a problem in the military justice system.³⁵⁰ The existence of a secret ballot does not solve the command influence problem because pre-vote deliberations can reveal dissenting panel members. It is also not mandated that the ballot remain secret after it is taken.³⁵¹ Dissenting members could later be forced to reveal their decision. Court stacking stems from the requirement that a convening authority appoint soldiers with a good judicial temperament.³⁵² It seems difficult, if not impossible, to determine persons' judicial temperament by examining their service

339. MCM, *supra* note 16, pmb1.

340. *See supra* text accompanying notes 306-07.

341. *See supra* Part II.B.

342. *See supra* Part II.C.

343. *See supra* Part II.D.

344. *See supra* text accompanying notes 6-7.

345. *See infra* note 381.

346. 16 M.J. 354 (C.M.A. 1983).

347. *See supra* text accompanying note 9.

348. Bush presided over nearly 150 executions as governor of Texas, including forty in 2000 alone, more than any state in history. The Associated Press, *Rally Denounces Executions*, N.Y. Newsday, Dec. 19, 2000, at A19.

349. *See supra* Part II.B.4.

350. *See Glazier, supra* note 204, at 45-54.

351. *See* Uniform Code of Military Justice art. 51, 10 U.S.C. § 851 (2000).

352. *See supra* text accompanying note 111.

record. Probably the best way to know persons' judicial temperament is to know them or know of them.³⁵³ This means a convening authority could appoint people who lean towards the same ideological viewpoint. If the convening authority wanted a death sentence it would not be difficult to appoint members who are known to be proponents of the death penalty or at least strong believers in good order and discipline.³⁵⁴

The federal system does not suffer from these problems. Since the pool is random, there is little chance the jury would want to convict to win the approval of the prosecutor. Randomness is so prized that an attempt to create a less random but fairer religious and racial grouping of jurors has been cause to vacate the trial and order a new one.³⁵⁵ The prosecutor has no ability to affect the lives or careers of the jurors before, during, or after the trial.

The biggest advantage in a twelve-member panel is the increase in the number of votes needed to sentence a person to death. Since the vote must be unanimous and is only taken once, an accused with twelve panel members has a larger pool from which to find a sparing vote than does a defendant with only five panel members. Judge Morgan wrote in his concurrence in *United States v. Simoy*:

The larger the jury pool, the more likely it is to harbor the one or two dissenting votes. Remarkably, a minority viewpoint held by 10 percent of the population (such as a strong moral aversion to the death penalty, perhaps?) has only a 28.2 percent chance of going unrepresented in a 12-member jury, but more than half of 6-member juries could be expected to have no representative of that view at all.³⁵⁶

This chance for excluding viewpoints grows if a convening authority can impanel members known not to represent a minority view.

The way a defense is conducted in the military also does not afford enough protection to compensate for a panel of only five members. There are two relevant issues: the quality of the defense³⁵⁷ and the amount of protection actually afforded by an Article 32 hearing.³⁵⁸ The quality of the defense attorney is a common criticism of both military and civilian capital trials. There are no specific qualifications

353. Telephone Interview with Col. Adele H. Odegard, *supra* note 226.

354. See Glazier, *supra* note 204, at 45-54; *supra* Part II.B.4.

355. *United States v. Nelson*, 277 F.3d 164, 201-05 (2d Cir. 2002).

356. *United States v. Simoy*, 46 M.J. 592, 627 (A.F. Ct. Crim. App. 1996). Other studies have found that the verdicts of smaller juries in criminal trials will vary to the detriment of the defendant. Ronald Jay Allen et al., *Comprehensive Criminal Procedure* 1188 (2001). Other studies have shown that a large jury is more likely to hang than a small one. *Id.* In the military this would mean the defendant could not be sentenced to death because the vote would not be unanimous. Uniform Code of Military Justice art. 52. 10 U.S.C. § 827 (2000).

357. See *supra* Part II.C.4.

358. See *supra* Part II.C.4.

for appointment of defense counsel in military capital cases. The same guidelines apply for capital and non-capital trials.³⁵⁹ The federal system at least requires that one defense counsel be learned in capital litigation.³⁶⁰ In the military, the CAAF has expressly rejected the argument that a capital defendant is entitled to counsel who is "death-qualified."³⁶¹ Similarly, many states do not have the same guidelines as the federal system.³⁶²

The "knowledge-gap" between capital and non-capital trials works to the detriment of a military defendant. There is one major difference between capital and non-capital courts-martial, the requirement of unanimity.³⁶³ This difference affects the way military defense attorneys conduct voir dire and presents a trap for the unwary defense counsel. In Senior Airman Simoy's trial, defense counsel used four challenges for cause and one peremptory to reduce the panel's size from thirteen members to eight.³⁶⁴ This reduced the chance Simoy had of receiving one vote against death. This difference in rules is not present in the federal system. In either system it is possible to receive an attorney inexperienced in capital trials,³⁶⁵ but in the military an inexperienced lawyer is faced with a trap that could lead to his client's execution. An incompetent military lawyer has one more problem to worry about than an incompetent civilian lawyer.

An Article 32 hearing and a grand jury provide similar levels of protection. A military defendant can put on a defense during the hearing,³⁶⁶ but if the charges are serious enough to possibly warrant the death penalty, it seems unlikely that justice and discipline would be furthered by an early acquittal. It seems more likely that a military defense attorney would use this hearing to probe the prosecution's case. This tactical advantage does not compensate for the tremendous disadvantage posed by a defendant not having twelve people deciding execution.

The appellate procedure may provide some safeguards and has saved several soldiers from execution, but entrusting a person's life and the reliability of the sentence to the military's two levels of appellate courts is dangerous. The appellate procedure does not provide a sufficient safeguard to offset a conviction and sentencing by fewer than twelve people. Before a court hears an appeal, the

359. See Uniform Code of Military Justice art. 27; *Simoy*, 46 M.J. at 619.

360. See *supra* text accompanying note 222.

361. *United States v. Curtis*, 44 M.J. 106, 126 (C.A.A.F. 1996).

362. See *supra* notes 261-66 and accompanying text.

363. See *supra* text accompanying note 115.

364. *Simoy*, 46 M.J. at 625 (Morgan, J., concurring) (stating that defense counsel's removal of four jurors almost amounted to ineffective counsel). It is unclear if Article 25a would remove this trap because the article does not state a quorum for capital trials or a maximum on the number of panel members.

365. See *supra* Part II.C.4.

366. See *supra* Part II.C.2.

convening authority, the SJA, and TJAG all examine the trial and the sentence.³⁶⁷ However, where death is imposed, it is always at the request of the convening authority. It seems unlikely the convening authority would commute a sentence that he or she asked for. The SJA is not a reliable safeguard because the office is part of the prosecution; it is impossible for it to be completely unbiased. TJAG is the only person in this chain who appears possibly neutral. TJAG's review, however, is limited only to determining whether the law supports the findings and sentence.³⁶⁸ TJAG does not examine for errors committed in the trial.³⁶⁹ The Courts of Criminal Appeal review cases presented to them by TJAG, the same office that appoints judges to their benches.³⁷⁰

The need for twelve-member panels is specific to the issue of capital punishment because death penalty prosecutions must adhere to a higher standard of reliability than other punishments. The Supreme Court has held that "death is qualitatively different from a sentence of imprisonment, however long. . . . There is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."³⁷¹ The military's prosecution of murder and rape committed in peacetime mandates an increased reliability. The capital cases previously discussed did not involve military crimes like spying or aiding the enemy, or even crimes committed during war or rebellion where good order and discipline is uniquely related. The crimes were non-military related murder, committed in peacetime. Some did not even occur on a military installation or involve a military victim.³⁷² While the murders were horrible, soldiers should not receive less protection because of their occupation. It is inexcusable to make it easier to put a person to death merely because he or she is in the military. This dichotomy needs to be remedied in the military system. Indeed, the government itself conceded in *Loving* that civilian standards should be applied "in the context of a conviction under Article 118 for murder committed in peacetime within the United States."³⁷³ If the military chooses to prosecute soldiers for uniquely civilian crimes and put them to death, then it should be held to the same reliability standards as the federal system.

367. See *supra* Part II.D.1.

368. See *supra* text accompanying note 274.

369. See *supra* text accompanying note 274.

370. See *United States v. Curtis*, 38 M.J. 530 (N-M. Ct. Crim. App. 1993); *United States v. Curtis*, 28 M.J. 1074 (N-M. Ct. Crim. App. 1989); *supra* text accompanying notes 275-76.

371. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

372. Dwight Loving robbed a cab driver in a town in Kansas. *United States v. Loving*, 34 M.J. 956, 959 (A. Ct. Crim. App. 1992).

373. *United States v. Loving*, 517 U.S. 748, 755 (1996).

B. Failure To Make the Necessary Change

Drawing on historical analogy, this section argues that the NDAA fails to guarantee twelve members in capital trials because the language in Article 25a is ineffective and can be easily manipulated. Section 582 of the NDAA attempts to require twelve members in capital trials by adding article 25a to the UCMJ. To reiterate, it reads:

In a case in which the accused may be sentenced to a penalty of death, the number of members shall not be less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.³⁷⁴

Representative Ike Skelton, author of the amendment, noted that all civilian capital trials have twelve jurors and said, “[o]ur servicemen and women deserve no lesser standard.”³⁷⁵ He is correct but, unfortunately, his amendment does not provide that standard. There are four problems with Article 25a, all centering on exceptions to the requirement of twelve. The first is the phrase “reasonably available,” the second is the phrase “physical conditions,” the third is the phrase “military exigencies,” and the fourth is the requirement of a “detailed written statement.”

The Articles of War, after their amendment in 1786 and before their replacement in 1950, called for convening thirteen-members panels only if it could be done “without manifest injury to the service.”³⁷⁶ In 1827, a unanimous Supreme Court gutted this requirement. The Court held that the decision on whether thirteen-members panels could be convened without manifest injury was in the sound discretion of the convening authority and was conclusive.³⁷⁷ After that ruling, manifest injury was merely a guide to the convening authority but had no bite to it. When the UCMJ was written, the phrase was discarded entirely.³⁷⁸

The phrases “manifest injury to service” from the amendment in 1786 and “military exigencies” from the NDAA amendment have a similar ring to them. If anything, the new standard is less stringent than the old one. A “manifest injury” would require some sort of

374. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012, 1124 (2001).

375. Bonner, *supra* note 10.

376. American Articles of War of 1786, art 1, reprinted in Winthrop, *supra* note 40, app. at 972; see also Sullivan, *supra* note 36, at 7.

377. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 34-35 (1827).

378. Uniform Code of Military Justice art. 16, 10 U.S.C. § 816 (2000).

damage whereas, according to *Black's Law Dictionary*, an exigency is merely a "[d]emand, want [,or] need."³⁷⁹ The other phrases from Article 25a, "reasonably available" and "physical condition," are so vague as to make one wonder if this could include the entire spectrum of complicating circumstances from unique wartime demands to a panel member having his car stolen and being unable to get to court. The Supreme Court decision in 1827 would probably not bind the Supreme Court because the UCMJ has replaced those Articles of War. The new exceptions, though, are not stringent and so vaguely worded that considering courts traditional deference to military authority, a convening authority would have great leeway in selecting the panel, leeway that could render the amendment almost completely ineffectual. The final sentence of Article 25a, requiring a written statement from the convening authority, also provides no guarantee because there is no body appointed to review this statement nor any standards to conduct such a review.

Even if all the linguistic loopholes previously mentioned were interpreted so narrowly as to render them moot, there still exists the possibility that after peremptory and causal challenges a panel of less than twelve members could remain. As the law currently stands, new members can only be added to the panel after assembly if the number drops below the quorum during voir dire, currently five.³⁸⁰ The new article does not make it clear if the quorum in capital cases is twelve. Since twelve only need be impaneled if physical conditions and military exigencies permit and five is the absolute minimum number, it seems that five is still the quorum. This throws into question the practicality of the amendment. What happens if fourteen members are impaneled and five are removed through challenges, leaving only nine? Does the trial proceed with only nine panel members but the penalty can no longer be death? Or is the rule restricting appointing new panel members a military exigency and the trial goes forward as capital but with only nine jurors? If the second scenario is true then the accused is no better off than before the amendment was passed. The deck still remains stacked in the prosecution's favor. The amendment is a laudable attempt to secure a basic civil right for soldiers faced with possibility of death, a right that is extended to every single civilian. But the loopholes, and the failure to define a quorum, prevent the amendment from doing what it should.

379. *Black's Law Dictionary* 296 (5th. ed. 1983).

380. MCM, *supra* note 16, Rules for Court-Martial 505(c)(2)(B).

C. Fixing Article 25a

1. How Article 25a Should be Fixed

This section evaluates which of the three branches of government is best suited to remedy the military panel problem. Ultimately, this section concludes it is necessary for Congress to amend Article 25a to ensure defendants in military, capital trials for civilian crimes receive the same protection as civilians. The next section suggests an addition to Article 25a that would protect the accused in capital trials while also maintaining the effectiveness of the military.

The Supreme Court cannot be relied upon to fix the defect for two reasons. First, the new article will only cover offenses committed after December 31, 2002. This means it could be ten years before the Supreme Court rules on the amendment. Second, the Court is unlikely to interpret the amendment narrowly. In the last twenty years the Court has repeatedly refused to apply civilian protections to the military.³⁸¹ The executive branch is also unlikely to offer any help. President Bush could remedy the problem by refusing to approve any executions until there is a solution. Given his track record in Texas, this seems unlikely.³⁸² The President could change the rules for replacing panel members before quorum is reached. This would be similar to former President Reagan's creation of aggravating factors, but this would only solve part of the problem. It would not close the loopholes that Congress has left open.

The job of closing the loopholes lies with Congress. Only a congressional amendment to Article 25a would be effective. The amended article should require all capital trials for murder under Article 118 and rape under Article 120(a) have twelve-member panels. If for any reason a twelve-member panel cannot be summoned, then the accused should be turned over to the civilian authorities for trial. If the crime is committed overseas, the accused

381. The Supreme Court overruled a lower court's ruling that articles 133 and 134 of the UCMJ were overbroad. *Parker v. Levy*, 417 U.S. 733, 758-59 (1974). Punitive Article 133 makes "conduct unbecoming an officer and a gentleman" a crime and Article 134 allows for prosecution of any offense that is detrimental to "good order and discipline." Uniform Code of Military Justice arts. 133-34. The trend against civil liberties continued in *Middendorf v. Henry*, 425 U.S. 25 (1970). The Court held that the constitutional right to counsel does not extend to a summary court-martial. *Id.* at 42. In *Chappell v. Wallace*, the Court held that:

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.

462 U.S. 296, 300 (1983). See generally John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 Ga. L. Rev. 161, 262-306 (2000).

382. See *supra* note 348 and accompanying text.

should be transferred to another military installation capable of handling the trial. The decision to turn over soldiers to civilian authorities or to move them to another installation should not be in the hands of the convening authority, but should be made by the Secretary of Defense. This would ensure that under no circumstances would an accused face the death penalty without twelve people sitting in unanimous judgment. Additionally, Article 25a should be rewritten to set the quorum at twelve. If any members were removed during *voir dire*, new members could be assigned as needed, even after assembly. Only legislation that mandates twelve-member panels and gives no exception can ensure our country's service members are afforded the same freedoms and protections they risk their lives to defend.

2. Proposed Additional Language of Article 25a

I propose the following additional language be added to Article 25a:

In a case in which the accused may be sentenced to a penalty of death and is charged with a violation of Article 118, Murder, and/or Article 120(a), Rape, the number of panel members shall not be less than 12. If 12 members cannot be assembled because of physical conditions or military exigencies, the defendant will be handed over for trial to the civilian jurisdiction where the crime occurred. If the offense is committed outside the jurisdiction of a United States court, the accused will be removed to another military installation that will impanel twelve panel members. The decision for removal to either a federal court or another military installation shall be made by the Secretary of Defense upon a showing of physical conditions or military exigencies.

This language would guarantee twelve people judge all service-members in capital trials for civilian crimes. The proposed amendment would also clearly state that the quorum for these capital cases is twelve. New panel members could be added after assembly if less than twelve remained after *voir dire*.

CONCLUSION

Military service members deserve the right to be judged by twelve people in capital trials for civilian crimes. The historical precedents of generally denying soldiers civilian protections and specifically denying the right to a twelve-member trial are no longer applicable. The creation of a system where a person can be sentenced to die by five people for committing what is essentially a civilian crime demands a heightened guarantee of reliability and fairness. The military system, particularly in the way a panel is impaneled and in the way a defense is conducted, does not create this guarantee. The discrepancy

between federal capital trials and military capital trials needs to be remedied.

Article 25a makes a laudable attempt to solve the problem but ultimately fails. It contains too many loopholes and ineffective language to secure soldiers the right to twelve-member panels. Congress should pass an amendment that removes the loopholes and makes the language more effective. This is the only way soldiers can get what they deserve—the same chance as their civilian counterparts to defend themselves and avoid execution.

Notes & Observations